



United States Department of the Interior

OFFICE OF THE SOLICITOR

Pacific Northwest Region
500 N.E. Multnomah Street, Suite 607
Portland, Oregon 97232

To: BLM Staff
From: Brad Grenham, Attorney, Office of the Regional Solicitor
Subject: **TIPS FOR COMPILING AN ADMINISTRATIVE RECORD**

An administrative record is the agency's evidence that its decision and decision making process complied with the law. The record needs to show that the decisionmaker: 1. understood the law applying to the decision; 2. considered all relevant factors; 3. made a reasoned decision. The court's review is normally limited to the record and the agency cannot supplement its explanations or evidence.

I. The administrative record consists of:

- All **documents** (whether in printed or electronic form) involved in the decisionmaking process from start to end (not just those relevant to the appealed issues, not just what the final decisionmaker has read, and not just what is complimentary about the decision). Documents reflecting differing views can ultimately help an agency because they can reflect the agency's consideration of different views if the agency documented this consideration.
- **Sources** of facts, methodology, and scientific background
- Relevant **studies** or data used by the agency. The full text of studies in the literature cited section of an EA or EIS can be provided on a CD. If this is not feasible, the index can note that the studies are available at BLM.
- The Record of Decision or Decision Record, FEIS, Comment Response, DEIS or EA, ID Team Documentation, Specialist Reports (Sampling, Field Notes, Testing, Calculations, Modeling, Literature), Planning Documents to which the decision was tiered, letters from expert agencies.
- In IBLA cases, include Appellant's Notice of Appeal and Statement of Reasons
- **E-mails** that contain relevant factual information or substantive analysis but not e-mail "chatter" concerning logistics of meetings, etc. Record compilation will be greatly simplified if email chatter is minimized during the project and staff is disciplined about not replying with an attachment if that attachment is not necessary. Assume that each e-mail will ultimately cost 20-30 minutes during record compilation to find, sort, review, number, and index. Every e-mail should have been written in a professional manner because it could end up in the record.

- **Drafts** should be included only if they are circulated for comment and contain significant substantive (not grammatical) comments that provide evidence of the substantive decision process. The record should not include internal working draft documents that were superseded by more complete versions of document.
- Personal **notes** (e.g., an individual's notes in a daily planner or journal) should not be included unless they are circulated as part of the planning process.
- **Maps** can be printed on smaller size paper if they are still usable and their contents are not changed.
- **Photographs** used as part of the decisionmaking process should be included and may be provided on a CD. To be useful, the photographs should have some legend identifying their location and date.
- The record does not include anything that came into existence after the challenged decision. A separate "implementation" record can be compiled for documents generated in implementing the decision, if implementation is at issue in the case

II. **Materials that should be listed in the index but excluded from the record:**

- **Attorney-Client Privileged** information (memos/advice/comments from attorneys as well as internal memos/emails repeating attorney advice) should not be included in the record and should be physically segregated as soon as the project record is started.
- **Deliberative Process Privileged** Information (agency internal recommendations and deliberations) may potentially be withheld as privileged if the agency head is willing to assert the privilege.
- The index will still need to identify that the above privileged documents are being withheld.
- There is no privilege for unprofessional statements made in emails.

III. **Compiling the Record:**

- Each document should be **tabbed and numbered** in a logical order (usually reverse chronological). The tabs should enable the reader to easily flip to the document.
- The record can be broken down by subject matter but the numbering should be consecutive so two documents do not have the same number.
- An **index** should briefly describe each document (e.g. letter from Smith to Jones about special status plants), the date of the document, and the tab number or bates stamp numbers. The index needs to identify documents being withheld as privileged (see attached example).

The index should not provide an agency's view on what the document means; it should only include an objective description of the document.

- **Copies required in IBLA cases:** 1 for the IBLA, 1 for each attorney representing a separate appellant (but you need not separately serve the appellant if the attorney is served), 1 for each intervenor, 1 for Solicitor's Office, 1 for BLM reference. BLM sends the record to each of these parties.
- **Copies required in federal court cases:** 2 for the court, 1 for each attorney representing a separate plaintiff (but you need not separately serve the plaintiff if the attorney is served), 1 for each intervenor, 1 for Solicitor's Office, 1 for U.S. Attorney's office, 1 for BLM reference.
- The federal district court in Oregon allows, but does not require, that the administrative record be **filed electronically** (i.e. on CDs). The record still needs an index and document numbering. The challenge is that some judges may still require an additional paper copy. Electronic records need to be text searchable PDF. Hyperlinks are optional but desirable.
- The Interior Board of Land Appeals allows for large supporting documents to be filed electronically but asks that key documents be provided in printed form.
- The BLM State Office has **contractors** who can prepare electronic records including electronic page numbering and additional paper copies.
- **Begin compiling the record early** in the decision process because a record may be necessary immediately upon issuing a decision if a plaintiff seeks a stay or injunction.

ADDITIONAL REQUIREMENTS FOR FEDERAL COURT CASES:

- A cover sheet should be the first document, it should contain the case caption, and should be entitled "Federal Defendants' [or Plaintiffs' if Agency is Plaintiff] Administrative Record"
- Next, a certification by the custodian of the record that the documents submitted constitute the whole record must be attached, with original of certification going to the court [see attached example]
- Oregon federal court rules require that each page be consecutively paginated, unless this would add confusion to use of the record. Thus, each document in the entire record should be consecutively "bates"-stamped, with the exception of bound documents which are already paginated. These bound documents should just have their cover or first page stamped with a number. This number would identify the whole document. Then, numbering would continue with the next document in the record.